

# Creation of Legal Mortgages in Nigeria: A Critique

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## Abstract

The sudden incursion of the Land Use Act into land ownership and administration in Nigeria has not been without difficulties and controversies. Despite having been in the Nigerian legal system for almost four decades, the law has not been fully settled as to the extent to which the statute has watered down the quantum of title which a land owner or occupier has in his land. Mortgage transaction is not left out of the lingering controversies. The nature of legal mortgage which a land owner or occupier may create in favour of a lender, would largely depend on the quantum of interest such mortgagor has in his land. Is there still a possibility of creation of mortgage of fee simple estate in Nigeria having regard to the Act? What is the maximum interest which a mortgagor may transfer to the mortgagee? Statutes dealing with mortgages, operating in different States in Nigeria, both prior and post the Land Use Act, have apparently contributed to the controversies, owing to some provisions therein which are seemingly in breach of the Act.

## 1. Introduction

Mortgage generally is the transfer or creation of an interest in a property, be it legal or equitable, by the owner of a property, in favour of a lender, in consideration of and as security for a loan, subject to redemption of the property upon repayment of the loan.<sup>1</sup> Creation of legal mortgages in different parts of Nigeria had initially toed the line of common law and the received English statutes.<sup>2</sup> Even the early Nigerian statutes<sup>3</sup> relating to mortgages did not depart much from the position of the common law and the English statutes dealing with mortgages. That was the position before the emergence of the Land Use Act in Nigeria.<sup>4</sup>

The Land Use Act tremendously curtailed the interest an owner or grantee of land in Nigeria may lay claim to, by ostensibly abolishing absolute title or interest in land in Nigeria.<sup>5</sup> This has serious effect on creation of legal mortgages in Nigeria. Some restrictive provisions in the Act relating to the quantum of interest a person may have in land in Nigeria, have created sharp division among learned scholars and practitioners, regarding the correct position of the law on modes of creation of legal mortgages in different parts of Nigeria. These divergent positions may not be unconnected with some provisions of some legislations regulating creation of legal mortgages in different parts of Nigeria, which appear to run contrary to the Land Use Act.

The aim of this paper is to critically analyze these provisions vis-à-vis the relevant provisions of the Land Use Act.

## 2. Nature of interest or title over land in Nigeria

Ownership of land in Nigeria pre-dates the Land Use Act. Land ownership in some parts of Nigeria was and is still popularly communal in nature,<sup>6</sup> with the members of the community or family having interest in such lands as grantees of specific portions, for farming and building purposes. This system of land ownership was and is still predominant in southern part of Nigeria.<sup>7</sup> Some portions of land were however owned individually by some persons. Such parcels of land may have been acquired by such persons through purchase, outright gift, conquest<sup>8</sup> or deforestation etc. by the person or his ancestors.<sup>9</sup> One general feature of land ownership in Southern Nigeria before the advent of the Land Use Act therefore, was that the owners possessed absolute title over the parcels of

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<sup>1</sup> See Gravells, N.P., *Land Law* (3<sup>rd</sup> edn. Sweet & Maxwell 2004) 892; s. 67 Mortgage and Property Law, Lagos 2010; Oniekoro, F. J., *Mortgages in Nigeria*(Chenglo Ltd.) 1

<sup>2</sup> One of such statutes is the Conveyancing Act (CA) of 1881 and 1882. The two statutes apply jointly in Nigeria.

<sup>3</sup> One of such statutes is the Property and Conveyancing Law(PCL), Chapter 100, Laws of Western Region of Nigeria, 1959. This statute is still applicable in some States in the former Western Region of Nigeria.

<sup>4</sup> Chapter L5, Laws of the Federation of Nigeria, 2004.

<sup>5</sup> In *Savannah Bank v. Ajilo*(1989) ANLR 26 at 27, Obaseki JSC, while lamenting the revolutionary effect of the Land Use Act, which was yet to be appreciated by land owners in Nigeria said: “*Since the promulgation of the Act by the Military Administration of General Obasanjo in 1978, the vast majority of Nigerians have been unaware of its revolutionary effect. They have been unaware that the Act swept away all the unlimited rights and interest they had in their lands and substituted them with very limited rights and rigid control of the use of their limited rights by the Military Governors and Local Governments.*” The case is also reported in (1989) 1 NWLR (Pt. 97) 305. See also *Abioye v. Yakubu*(1991) 5 NWLR (Pt. 190) 130; *Nkwocha v. Governor of Anambra State*(1984) 1 SCLNR 634.

<sup>6</sup> See *Tijani v. Secretary Southern Nigeria*(1921) AC 399 at 407.

<sup>7</sup> See Smith, I.O., *Practical Approach to Law of Real Property in Nigeria* (Ecowatch Publications Nig. Ltd.) p. 5. See also *Dawodu v. Dawodu*(1958) 3 FSC 46; *Lewis v. Bankole*(1909) 1 NLR 82.

<sup>8</sup> See *Echi v. Nnamani*(2000) 5 S.C.T 62.

<sup>9</sup> See *Eshilonu v. Emereonyekwe*(2002) 10 NWLR (Pt. 776) 634 at 638; *Okoroafor v. Abaworonini*(1996) 2 NWLR (Pt. 430) 278.

land and exercised maximum acts of ownership over such lands.<sup>1</sup>

In the Northern Nigeria, the position was different. All lands in a particular area were vested in the Emir who held same in trust for the benefit of the people.<sup>2</sup> After the conquest by the British, they established a regulated system whereby all lands formerly held by the Fulanis were vested in and controlled by the colonial government. This system of official control of land was achieved through series of instruments and statutes.<sup>3</sup> It is therefore safe to say that persons from Northern Nigeria didn't enjoy much of absolute title to land prior and post-British rule and after the independence, before the Land Use Act.<sup>4</sup>

The Land Use Act came with a uniform system of administration of land in the entire country. All title to land in Nigeria currently is seemingly derived from the Governor of the State where the land is located. The Governor of each State in Nigeria has been statutorily made the trustee of all the lands comprised in the State, for the benefit of all Nigerians.<sup>5</sup> The Act empowers the Governor to grant statutory right of occupancy to persons in both urban and non-urban area, for both building and agricultural purposes.<sup>6</sup> Also, the local government is empowered to grant customary right of occupancy to persons over land located in non-urban area in the local government area.<sup>7</sup> These are known as express grants by both the Governor and the local government.

Many persons in Nigeria who were in possession or occupation of lands before the coming into effect of the Act, are permitted by the statute to continue to hold or occupy such lands as if statutory or customary right of occupancy, as the case may be, had been granted to them by the appropriate authority.<sup>8</sup> The tenure and rights of the express grantees of right of occupancy under the Act, are as stipulated in the instruments containing the terms of the grant.<sup>9</sup> The legal effect of the Land Use Act therefore is to unify land administration in Nigeria, abolish absolute interest or title or fee simple estate in land by any person in Nigeria and preserve the title or interest held by any person over any parcel of land in Nigeria, subject however to the provisions of the Act.<sup>10</sup> By virtue of the Act, any transaction involving legal interest or transfer of possession in land in any part of Nigeria, must be with the requisite consent of either the Governor of the State or the Local Government where the land is located.<sup>11</sup>

### 3. Creation Of Legal Mortgages In Nigeria

A legal mortgage is one that transfers all or some quantum of legal interest or title of the mortgagor in the property to the mortgagee or otherwise creates a legal interest in the mortgagor's property in favour of the mortgagee, as security for a loan subject to redemption upon repayment of the loan by the mortgagor.<sup>12</sup> The

<sup>1</sup> This type of title is equivalent to fee simple estate under the English law. See *Oso v. Olayoye*(1966) 1 NMLR 329; *Coker v. Animashaun*(1960) LLR 71; *Hammed v. Afolaranmi*(1969) ANLR 571.

<sup>2</sup> See Smith, I.O.(n.7) 28.

<sup>3</sup> They include Public Lands Proclamation 1902, Lands and Native Rights Proclamation of 1910, Native Rights Ordinance of 1916 and Land Tenure Law of 1963. See Smith, I.O. (n.7) 30-31.

<sup>4</sup> Most lands in Northern Nigeria were immediately prior to the Land Use Act, vested in the Minister for Lands and Survey who was to administer same for the benefit of all natives of Northern Nigeria. See s. 4 Land Tenure Law, Chapter 49, Laws of Northern Nigeria 1963. See also Smith I.O. *ibid* p. 30.

<sup>5</sup> See s. 1(1) Land Use Act. Lands held by the Federal Government or any of its agencies in any State in Nigeria are however vested in the Federal Government. See s. 49 of the Act. Also, all lands comprised in the Federal Capital Territory are also vested in the Federal Government. See s. 297(1) 1999 Constitution. However, such lands are to be administered under the Land Use Act by the President or any Minister designated by him in same manner as a State Governor subject to necessary modifications. See s. 52(2) Land Use Act. We are therefore in agreement with Professor Smith that the Land Use Act is applicable to lands in the Federal Capital Territory. See Smith, I. (n.7) 739. See however *Ona v. Atenda*(2000) 5 NWLR (Pt. 656) 244, where the Court of Appeal held a contrary view.

<sup>6</sup> S. 5(1) *ibid*. Such grant of statutory right of occupancy extinguishes all other rights and interests by other persons over the land. See s. 5(2) *ibid*. Provided that there is no other person who had a better title to the land than the grantee. See *Romaine v. Romaine*(1992) 4 NWLR (Pt. 238) 650 at 662 where Nnaemeka-Agu JSC stated: "But it does not mean that once a claimant produces what he claims to be an instrument of grant he is automatically entitled to a declaration that the property which such an instrument purports to grant is his own. Rather production and reliance upon such an instrument inevitably carries with it the need for the court to enquire into some or all of a number of questions....." See also *Savannah Bank v. Ajilo*(n.5); *Kyari v. Alkali*(2001) 11 NWLR (Pt. 724) 412 at 426.

<sup>7</sup> S. 6(1) *ibid*. Such right of occupancy may be for building or agricultural purposes.

<sup>8</sup> See ss. 34(2)&(5) for deemed statutory right of occupancy and 36(2)&(4) *ibid*, for deemed customary right of occupancy. These persons are regarded as deemed grantees of right of occupancy and upon application to the appropriate authority and production of relevant evidence of title to the land, would be granted express right of occupancy. See *Kyari v. Alkali*(2001) 11 NWLR (Pt. 724) 412 at 428. The rights of customary title holders over their land have not been taken away by the Act, though they hold subject to the Act. They can therefore put customary tenants on the land and collect tributes from them. They do not however have absolute title over such lands. See *Abioye v. Yakubu*(n.5) at 158.

<sup>9</sup> Such tenure should not however exceed ninety-nine years in respect of each grant.

<sup>10</sup> A grantee of a right occupancy in Nigeria may be likened to one with a leasehold interest with the Governor or the Local Government as the lessor. All other holders or occupiers of land prior to the Land Use Act are holding or occupying the lands subject to the rights of the Governor under the Act. See Smith, I. O. (n. 7) p. 7. The Land Use Act has not extinguished the title of any person to a parcel of land be it customary or statutory. It has only divested radical title or interest in land from holders or occupiers of land in Nigeria. see *Abioye v. Yakubu*(n.5) at p. 156.

<sup>11</sup> See ss. 21 & 22 of Land Use Act. The requirement for consent before alienation applies to both express and deemed grantees of right of occupancy. See *Savannah Bank v. Ajilo*(n.5)p. 44.

<sup>12</sup> This may come in form of a legal charge which does not actually transfer mortgagor's interest or title in the property to the mortgagee.

involvement of legal interest in creation of legal mortgage necessitates the mandatory requirement for the document of creation to be under seal.<sup>1</sup>

The modes of creation of legal mortgages in Nigeria will depend on the part of the country the land is located. Some modes of creation are however similar in all parts of Nigeria. We shall discuss modes of creation of legal mortgages in Nigeria with regard to the legislation applicable to a particular part of Nigeria. We shall therefore consider modes of creation in parts of Nigeria where the received English statutes (i.e. CA 1881 & 1882) and common law apply,<sup>2</sup> jurisdictions where the Property and Conveyancing Law(PCL) applies<sup>3</sup> and Lagos State where the Mortgage & Property Law of Lagos State 2010 applies.

#### **A. Mortgage & Property Law of Lagos State**

The former mode of creation of legal mortgage in Lagos State was largely by charge of the property of the mortgagor in favour of the mortgagee, completion of the requisite form and registration of the form at the land registry in Lagos.<sup>4</sup> The charge or sub-charge when registered operated as an encumbrance on the property of the mortgagor.<sup>5</sup> Also, the chargee (the lender) from the date of such registration of the charge, was entitled to the same rights, powers and remedies of a mortgagee as if the property has been conveyed to him by deed, by way of legal mortgage.<sup>6</sup> Areas not covered by the Registration of Titles Law may have legal mortgages relating to land created in the same manner as under the common law and the Conveyancing Act of 1881 and 1882.<sup>7</sup> Such modes of creation were by assignment by the mortgagor of the residue of his term, sub-demise for a term of years absolute, both with proviso for redemption and statutory mortgage.<sup>8</sup>

That was the position in Lagos State until the Mortgage and Property Law of Lagos 2010 commenced. This law has prescribed modes of creating legal mortgages in Lagos depending on the nature of title held by the mortgagor over the land in question. Legal mortgages may therefore be created in Lagos State in any of the following ways:

##### **a. Legal Mortgage of Right of Occupancy**

A grantee of right of occupancy over any land in Lagos State<sup>9</sup> is only capable of creating legal mortgage in any of these three ways:

- i. Demise for a term of years absolute subject to a cesser<sup>10</sup> on redemption;
- ii. Charge by deed expressed to be by way of legal mortgage; or
- iii. Charge by deed expressed to be by way of statutory mortgage.<sup>11</sup>

The use of the word “demise” in the section for the creation of the term of years absolute is confusing. A right of occupancy granted by either the Governor of a State in Nigeria or a local government, operates in the form of a lease. The grantee of such right of occupancy may only grant a sub-lease (sub-demise) to a third party.<sup>12</sup> It is therefore our humble view that the holder of a right of occupancy under the Land Use Act cannot

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See Megary, R. & Wade, W., *The Law of Real Property* (Charles Harpum ed. 6<sup>th</sup> edn. Sweet & Maxwell 2000) 1170. See also s. 67 Mortgage & Property Law Lagos.

<sup>1</sup> No transfer or creation of legal interest in land by a grantor in favour of a grantee may be valid except it is made by deed. See Imhanobe, S. O., *Legal Drafting & Conveyancing*: (2<sup>nd</sup> edn. Sylvester Imhanobe Legal Research Ltd. 2007) 172. See also s. 77(1) Property & Conveyancing Law 1959, applicable to States in the former Western Region of Nigeria. Also *Akingbade v. Elemosho* (1964) ANLR 146 at 149; *Igbum v. Yinusa* (2001) 9 WRN 15 at p. 19.

<sup>2</sup> The areas include Abuja, Kano, Enugu etc.

<sup>3</sup> Some of the States include Osun, Edo, Oyo etc.

<sup>4</sup> See s. 18 of the Registration of Titles Law(RTL), Chapter R4, Laws of Lagos State 2003. This law has been repealed by the Lagos State Land Registration Law 2015. The mortgage under that law would be completed by filing of ‘Form 5’ which was a schedule to the Law. See First Schedule to the Law. The chargee (mortgagee) who under the statute was the registered owner of the charge, may create a sub-charge over the property using the same ‘Form 5’ and registering same in the Land Registry. See s. 19 of Registration of Titles Law. See also Adubi, C., *Legal Drafting Conveyancing Law, Wills and Practice*: (The Light House Publishing Co. Ltd 2002) 242; Imhanobe, S. O. (n.22) 374.

<sup>5</sup> S. 19 Registration of Titles Law Lagos 2003.

<sup>6</sup> See s. 22(a) *ibid*.

<sup>7</sup> Such places were not regarded as registration districts within the contemplation of the Law, except the Governor of Lagos State by order, included any of such areas as a registration district. See s. 2 of the Law. See *Vulcan Gases Ltd. V. GIV* (2001) 9 NWLR (Pt. 719) 610. See also s. 68 of the Mortgage and Property Law Lagos 2010 which expressly excludes the application of Conveyancing Act 1881 to mortgage transactions in the State.

<sup>8</sup> The first two were under the common law while the third mode was pursuant to s. 26(1) CA 1881.

<sup>9</sup> Such rights and remedies of a mortgagee included foreclosure, sale and entry. Such chargee was also subject to same liabilities as that of a legal mortgagee. See S. 22(a) Registration of Titles Law Lagos 2003.

<sup>10</sup> This means determination of the mortgage term, upon redemption of the mortgage by the mortgagor. See Black’s Law Dictionary, 8<sup>th</sup> edn. p. 242.

<sup>11</sup> S. 15(1) Mortgage and Property Law Lagos. See also Essien Enefiok, ‘Creation of Mortgages Under the Mortgage And Property Law of Lagos State 2010’: in Smith, I. & Oni, B. (Ed.) *Essays on the Lagos Mortgage & Property Law 2010* (Department of Private & Property Law, Faculty of Law, University of Lagos, Nigeria 2015) 35; Smith, I.O. (n.7) 366.

<sup>12</sup> See ss. 21 & 22(1) Land Use Act. Both sections prohibit alienation of the right of occupancy both customary and statutory respectively by way of sub-lease among others by the holder, without the consent of the local government or the Governor as the case may be. The prohibition of alienation by way of sub-lease presupposes that the holder in both cases is regarded as a lessee while the Governor or the local government is the lessor. It is however possible for the issue as to use of term ‘demise’(lease) or ‘sub-demise’(sub-lease) to be regarded as one of mere technicality which may not invalidate the mortgage.

create a mortgage by “demise”(lease). He may only do so by way of sub-demise(sub-lease) for a term of years.<sup>1</sup> There is even no duration for the demise for the term of years absolute in the provision. It is however our humble opinion that as demise is same as lease, such term of years should not be above the term granted the mortgagor in the right of occupancy, otherwise it may operate as a mortgage by way of an assignment of the residue of the right of occupancy.<sup>2</sup>

#### **b. Term of Years Absolute**

A term of years absolute is a leasehold interest. A lessee<sup>3</sup> who desires to create a legal mortgage in Lagos relying on this type of title can only do so by any of these three ways:

- i. Sub-demise (sub-lease) for a term of years absolute less by at least one day than the term held by the mortgagor, subject to cesser on redemption ;
- ii. Charge by deed expressed to be by way of Legal Mortgage; or
- iii. Charge by deed expressed to be by way of statutory mortgage.<sup>4</sup>

The provision for the term of years so created to be at least one day less than the term vested in the mortgagor is superfluous. What makes a transaction a sub-demise(sub-lease) in all circumstances, is the fact that the term created must be less than the term held by the sub-lessor. If he gives out the entire term held by him or purports to give a higher term than he held, the law may imply that he has assigned his unexpired interest in the leasehold.<sup>5</sup> The Mortgage and Property Law Lagos adopted the former modes of charge under Registration of Title Law and sub-demise and statutory mortgage under common law and Conveyancing Act 1881, with some variations. It however dropped mortgage by way of assignment and converted it(if it is created) to demise or sub-demise as the case may be.<sup>6</sup>

#### **B. Property & Conveyancing Law 1959**

This law was made at the time when there was a region known as Western Region of Nigeria.<sup>7</sup> Many States have been carved out of that Region<sup>8</sup> but some statutes applicable to that Region still apply to some of these States. Legal mortgage may be created under this statute in any of the following manners:

- i. Legal mortgage of an estate in fee simply may only be created by demise for a term of years absolute subject to a provision for cesser on redemption or charge by deed expressed to be by way of legal mortgage.<sup>9</sup>
- ii. Legal mortgage of a term of years absolute(leasehold)<sup>10</sup> may be created by any of these ways:
  - a. Sub-demise(sub-lease) for a term of years absolute less at least one day than the term held by the mortgagor, with a provision for cesser on redemption;
  - b. Charge by deed expressed to be by way of legal mortgage,<sup>11</sup> or
  - c. Charge by deed expressed to be by way of statutory mortgage.<sup>12</sup>

Section 108 of the Property and Conveyancing Law presents a serious legal issue. The first is that there is

<sup>1</sup> We are of the humble view that s. 15 of the Mortgage and Property Law is unnecessary, as the provisions are covered by s. 16 of the same law, as ‘demise’ as a mode of creation of legal mortgage appears to be contrary to ss. 21 & 22 of the Land Use Act. The fact however that demise as contemplated in the section, relates to right of occupancy under the Act, which tenure is restricted to only ninety-nine years, may bring the mode of creation within the bound of legality.

<sup>2</sup> Assignment as a mode of creation of legal mortgage is not permitted under the Mortgage and Property Law Lagos. Where however such a mode of creation is adopted by a mortgagor, the statute does not render such mode of creation invalid. It is rather deemed by the statute that the mortgagor created a mortgage by way of demise or sub-demise as the case may be, for a term of years absolute, with a provision for redemption, for right of occupancy and leasehold interests respectively. See ss. 15(2) & 16(2) MPL Lagos.

<sup>3</sup> This may include a sub-lessee. The Land Use Act actually recognized a grantee as a lessee who is capable of creating a sub-lease. See s. 22(1) of the Act. It may however not be out of place for such grantee or a deemed grantee to create a lease instead of a sub-lease. The title of the instrument may not defeat its substance in so far as the intention of the parties is quite clear upon perusal of the instrument and appropriate consent is sought and obtained.

<sup>4</sup> S. 16(1) Mortgage & Property Law Lagos. These modes of creation should have also been reserved for mortgage of right of occupancy.

<sup>5</sup> See *Milmo v. Carreras* (1946) KB 306. See also Megarry, R. & Wade, W (n. 21) 808.

<sup>6</sup> See ss. 15(2) & 16(2) MPL

<sup>7</sup> This region was carved out from Southern Province in 1939, with its capital located at Ibadan. See <<https://www.hubert-herald.ni>> assessed 3<sup>rd</sup> March 2018.

<sup>8</sup> Some of these States include Ondo, Ogun, Ekiti, Delta, Edo etc.

<sup>9</sup> S. 108(1) Property & Conveyancing Law (PCL) (n.2). From the date of the mortgage, the first and only mortgagee should take a term of three thousand years. See S. 108(2)(a) *ibid*. This is obviously inconsistent with the Land Use Act under which the maximum interest a person may have in a piece of land may not exceed ninety-nine years. See Dadem, Y.Y., *Property Law Practice In Nigeria*: (3<sup>rd</sup> ed. Jos University Press Ltd. 2015) 155; *Hassan v. Jauro*(2002) 25 WRN 18. See also Ayuli Jemide, ‘Certificate of Occupancy: What happens after 99 years’, <[www.detailsolicitors.com](http://www.detailsolicitors.com)> accessed on 8<sup>th</sup> day of April 2018.

<sup>10</sup> Term of years means leasehold interest which is similar to right of occupancy.

<sup>11</sup> S. 109(1) PCL; Eimunjeze, F.: *Real Property Law and Practice in Nigeria* (Malthouse Press Ltd 2014) 158. Where a legal mortgage by way of assignment of a leasehold interest is created under the Law, it should be deemed that a mortgage by way of sub-demise was created and the first or only mortgage term should be ten days less than the term expressed to be purportedly assigned to the mortgagee. The second or any subsequent mortgage should be at least one day longer than the term vested in the first or prior mortgagee. See S. 109(2) *ibid*.

<sup>12</sup> See S. 137(1) PCL.



no person in Nigeria presently that holds an estate in fee simple absolute by virtue of the Land Use Act.<sup>1</sup> The highest title to land in Nigeria now is a term of years granted by the Governor or local government by way of a right of occupancy.<sup>2</sup> Even the right of occupancy which may be granted by the Governor or the local government cannot exceed a period of ninety-nine years for a single grant, though subject to renewal after expiration.<sup>3</sup>

It is therefore our humble view that creation of mortgage of fee simple estate by way of demise, charge by deed or any other mode whatsoever is no longer applicable in Nigeria. A legal mortgage that is capable of being created in States covered by the Property and Conveyancing Law, is mortgage of a leasehold interest which can be created by sub-demise (sub-lease), charge by deed expressed to be by way of legal mortgage or charge by deed expressed to be by way of statutory mortgage.<sup>4</sup>

### C. Conveyancing Act 1881 & Common Law

Conveyancing Act<sup>5</sup> and Common Law have been made applicable to Nigeria<sup>6</sup> and have remained in existence presently in some parts of Nigeria.<sup>7</sup> There had been some modes of creation of legal mortgages in the early years in England prior to 1900.<sup>8</sup> The procedure for such creation went through many changes and very close to between 1881 and 1900, three modes of creation of legal mortgage of leasehold were applicable in England and by extension, to Nigeria.<sup>9</sup> They were:

- i. Assignment of the leasehold to the mortgagee with a covenant for re-assignment upon redemption;
- ii. Sub-lease (sub-demise) to the mortgagee with at least one day less than the term held by the mortgagor, with a proviso for cesser on redemption.<sup>10</sup> and
- iii. Charge by deed expressed to be by way of statutory mortgage.<sup>11</sup>

These three modes of creation apply to States where Conveyancing Act of 1881 & 1882 are applicable. Assignment of a lease as a mode of creation of legal mortgage has many challenges. First, it automatically brings the mortgagee into direct contact with the headlessor (the Governor) by virtue of the principle of privity of estate.<sup>12</sup> This imposes liability on the mortgagee for payment of rent to the head lessor as well as the observance of other covenants in the head lease.<sup>13</sup> Also, a mortgagor who has assigned his leasehold interest to the mortgagee may not be capable of creating any successive legal mortgage in favour of subsequent mortgagees.<sup>14</sup> He may only be capable of creating equitable mortgage for subsequent mortgagees based on his equity of redemption.<sup>15</sup> Also its mode of discharge is cumbersome as the mortgagee must execute a deed of re-conveyance,

<sup>1</sup> S. 1(1) of the Land Use Act has vested all lands comprised in each State in the Governor of the State to hold in trust for the benefit of all Nigerians.

<sup>2</sup> See ss. 5 & 6 *ibid.* See also Smith I.O. (n.7) 46-7. We however, with the greatest respect, disagree with Professor Smith that mortgage of right of occupancy could be created by means of demise for a term of years absolute under section 108(1) of Property and Conveyancing Law 1959. The section in question deals with mortgage of fee simple estate and we do not with respect, subscribe to the view that the estate mentioned therein could be commuted to right of occupancy. That would amount to re-writing of that section of the statute. Mortgage of leasehold, which is equivalent to right of occupancy in Nigeria, may be created under section 109 of the Law by way of sub-demise or sub-lease among other modes of creation.

<sup>3</sup> See Smith, I.O. *ibid.* at p. 58

<sup>4</sup> See s. 109 PCL. *Dadem, Y. (n.42) & Imhanobe S., (n.22)* omitted charge by deed by expressed to be by way of statutory mortgage under S. 137 of the Law. See also Smith, I.O. (n. 7) 366.

<sup>5</sup> There is the one of 1881 which was amended by one of 1882. Both statutes still apply to Nigeria.

<sup>6</sup> The Act is one of the statutes of general application. The common law, the Act and doctrines of equity which apply to Nigeria must have been in force in England on the 1<sup>st</sup> day of January 1900, among other qualifications. See s. 32(1) Interpretation Act. There are similar provisions in some State - enacted statutes all over the country. See for instance s. 28 High Court Law, Chapter 49, Laws of Northern Nigeria 1963.

<sup>7</sup> Some of the States where the Conveyancing Act and Common Law mode of creation of legal mortgages apply may include Kano, Kaduna, Anambra, Enugu and many other states that do not have local legislations relating to property transactions in Nigeria.

<sup>8</sup> These include conveyance of the fee simple estate to the mortgagee with a covenant for re-conveyance to the mortgagor upon full payment of the loan. The other one was lease or demise of the property to the mortgagee, which lease would come to an end upon repayment of the loan by the mortgagor. See Megarry, R & Wade, W. (n.21) p. 1172. Those modes of creation existed in England in the 17<sup>th</sup> Century.

<sup>9</sup> Freehold or estate in fee simple is no longer possible in Nigeria and any creation of mortgage in Nigeria should be one of leasehold estate subject to the provisions of the Land Use Act. Such leasehold estate may arise from actual or deemed grant of right of occupancy whether statutory or customary by the Governor or the local government. See ss. 5, 6, 34 & 36 of the Land Use Act. See also Eimunjeze, F. (n.44) 156.

<sup>10</sup> Both assignment of the lease and sub-demise(sub-lease) to the mortgagee are common law principles which are not captured in the Conveyancing Act 1881 & 1882. See Megarry, R & Wade, W. (n. 21) P. 1178. Creation of a mortgage of leasehold by sub-demise in England became codified as from 1925 in S. 86(1) of Law of Property Act 1925.

<sup>11</sup> S. 26(1) Conveyancing Act 1881 (CA). This should be as in form 1 of the Third Schedule to the Act with such variations as may be necessary. See *Dadem, Y. Y. (n.42)*. Professor Smith identified assignment of the right of occupancy (lease) and sub-lease as the only modes of creation of legal mortgage of leasehold in Conveyancing Act States. See Smith, I. O. (n. 7) P. 366. Imhanobe holds similar view. See Imhanobe S. (n. 22) 374. Both learned authors omitted. s. 26 of Act, which provides for statutory mortgages.

<sup>12</sup> The mortgagee would then be liable for covenants touching on the land such as covenant on user, covenant to repair etc. See Megarry, R.: *Megarry's Manual of Law of Real Property* (Oakley, A. J. ed. 8<sup>th</sup> edn. Sweet & Maxwell 2002) 381

<sup>13</sup> See Megarry, R., *ibid.* p. 495

<sup>14</sup> The mortgagor can only create subsequent equitable mortgages by relying on his equity of redemption. See Megarry & Wade (n.21) 1178.

<sup>15</sup> See Megarry J. et al, (n.21) P. 1178. Such covenants may include User, sub-letting etc. Such restriction on creation of subsequent legal mortgages may make mortgage by assignment to be unattractive to mortgagors. The issue of privity of estate with the headlessor and liability for covenants in the lease may make such mode of creation of legal mortgage unattractive to the mortgagee. See Imhanobe, S., (n. 22) 376.

release, discharge or surrender for the mortgage to be validly discharged. It is quite different from other mortgages which may be discharged by means of statutory receipts.<sup>1</sup>

Dr. Oniekoro has argued in his book,<sup>2</sup> that a legal mortgage by way of demise and conveyance of right of occupancy may be employed by those with deemed right of occupancy, in creation of legal mortgage in States where the Conveyancing Act was applicable. He was of the opinion that deemed holders of right of occupancy had unlimited interest in their land, which was not subject to limitations by the Governor, under section 8 of the Land Use Act.<sup>3</sup> With the greatest respect to the learned author, we beg to differ from his position. First, in our humble view, the Land Use Act does not contemplate freehold estate or unlimited title or interest in land in favour of any land owner in Nigeria, irrespective of whether such owner is an express grantee or deemed grantee of right of occupancy, either by the Governor or the local government. It follows therefore that since the title of any land owner in Nigeria is a right of occupancy, whether express or deemed grant, such conveyance contemplated by the learned author could be achieved with an assignment of the residue of the right of occupancy, since conveyance may be synonymous with fee simple estate.<sup>4</sup> In *Savannah Bank v. Ajilo*,<sup>5</sup> Obaseki JSC, while resolving an issue on this point said:

*While the interest vested in the Military Governor is unstated in the Act, the interest a Nigerian can lawfully acquire from the Military Governor is scaled down to statutory right of occupancy. In terms of known interests in land, the quantum of a statutory right of occupancy remains unclear. To the extent that it can only be granted for a specific term (see section 8 of the Act) it has the semblance of a lease. Also to the extent that a holder has the sole right to and absolute possession of all the improvements on the land during the term of a statutory right of occupancy, a holder does not enjoy more rights than a lessee under common law. When therefore section 34(2) of the Act converted the interest held by an owner to a statutory right of occupancy, the Act reduces him to the position of a tenant subject to the control of the State through the Governor.<sup>6</sup>*

Secondly, mortgage by way of demise at common law, also implies that the mortgagor has some semblance of unlimited title in the land. Even when such mode of creation was codified in foreign<sup>7</sup> as well as local statutes,<sup>8</sup> the term of years statutorily granted the mortgagee was a maximum of three thousand years.<sup>9</sup> Such mode of creation of legal mortgage, may therefore run contrary to the provisions of the Land Use Act.<sup>10</sup> Sections 34 and 36 of the Land Use Act regard the deemed grantees of right of occupancy as persons who were holders of the right of occupancy ‘as if’<sup>11</sup> such right of occupancy had been granted to them by the appropriate authority. The implication of the provisions in our humble opinion, is that the Governor’s rights of control over the land are not limited to only compulsory acquisition and grant of consent to alienate the property. The Governor may compel the deemed grantees to come forward and apply for express grant within a specified period. Such request from the Governor, when complied with, entitles the Governor to grant to each applicant the length of term he deems fit.<sup>12</sup> The title or interest held by deemed grantees of right of occupancy cannot therefore be likened to fee simple estate.

Three major modes of creation of legal mortgage have been identified by many learned authors in jurisdictions applying the Conveyancing Act and common law in Nigeria.<sup>13</sup> Some authors however identified

See Megarry J. et al. (n.21) 1178; also Eimunjeze, F. (n. 44) 160

<sup>1</sup> Such mortgages include charge by deed expressed to be by way of legal or statutory mortgage and Demise or sub-demise for a term of years absolute. See ss. 135(1) PCL; 47(1) Mortgage & Property Law(MPL) Lagos & 22 CA.

<sup>2</sup> Oniekoro, F.,(n.1) pp. 64-65

<sup>3</sup> Ibid at p. 65

<sup>4</sup> See Megarry, J. et al. (n.21) 1171. When such conveyance of fee simple was used at common law around 15<sup>th</sup> century, the mortgagee would usually take possession of the property immediately after such conveyance and the mortgagor was bound to lose his property to the mortgagee if he defaulted in re-payment of the loan for even a day. See *Kreglinger v. New Patagonia Meat and Cold Storage Ltd.* (1914) AC 25 at 35. That position was very harsh and has never been part of the Nigerian Law on mortgage transactions.

<sup>5</sup> (1989)(n.5)

<sup>6</sup> Ibid at p. 45.

<sup>7</sup> See s. 85(1) Law of Property Act 1925 (U.K.)

<sup>8</sup> See s. 108(1) PCL 1959(Nig.)

<sup>9</sup> See ss. 108(2)(a) PCL; 85(2)(a) LPA 1925(U.K.). The Mortgage and Property Law Lagos, which also contain demise as a mode of creation of legal mortgage, is in our humble view, erroneous as a right of occupancy under the Land Use Act, operates as a lease and can only be mortgaged by way of sub-lease(sub-demise) or assignment as the case may be. See s. 22(1) Land Use Act.

<sup>10</sup> Moreover, it has always been the practice for banks to insist on possession of a certificate of occupancy over a piece of land which the mortgagor intends to use as security for the loan. Once such certificate of occupancy is issued by the appropriate authority to the prospective mortgagor, he ceased to be a deemed grantee of a right of occupancy.

<sup>11</sup> Italics ours for emphasis.

<sup>12</sup> See ss. 34 & 39 of the Land Use Act.

<sup>13</sup> These learned authors include Dadem, Y. (n.42) 154, Eimunjeze, F; (n.44) 156, Oniekoro, F. J., (n.1) 65 – 67. Apart from acknowledging those three modes of creation, Dr. Oniekoro argued that two other modes of creation were permissible. They were conveyance of mortgagor’s

only two modes,<sup>1</sup> leaving out statutory mortgage. There may be however, in our humble view, another mode of creation of legal mortgage in Conveyancing Act States. That mode, we humbly submit, is charge by deed expressed to be way of legal mortgage; otherwise known as legal charge.<sup>2</sup> There is no express provision for this mode of creation in the Conveyancing Act. However, the Act defined mortgage to include any charge on any property for securing money or money's worth.<sup>3</sup> Creation of legal mortgage using this mode does not require any statutory format and is applicable in other jurisdictions in Nigeria.<sup>4</sup> The reference to it in Conveyancing Act 1881 indicates that such mode of creation was in existence under common law in addition to other modes of creation. Moreover, the use of this mode of creation is not prohibited by either the Act or under common law.

It is obvious that two modes of creation of legal mortgage run across the three jurisdictions in Nigeria. These are sub-demise(sub-lease) and legal charge(including statutory charge). The uniformity of application to all parts of Nigeria may give these modes some level of preference above the other modes of creation. The consequences of using each of these modes may however differ with respect to the location of the land. A legal mortgage by way of sub-demise, apart from requiring the prior consent of the Governor,<sup>5</sup> for its creation, has the disability of not transferring the whole title of the mortgagor to the mortgagee, unlike in mortgage by way of an assignment. The implication of this defect is that in Conveyancing Act jurisdictions, the mortgagee may, in the event of default by the mortgagor, find it difficult selling the property because of the reversionary interest of the mortgagor.<sup>6</sup> Mortgage by way of sub-demise however has the advantage of enabling the mortgagor to create subsequent legal mortgages with other mortgagees using the same property.<sup>7</sup>

A charge by deed expressed to be by way of legal mortgage and a charge by deed expressed to be by way of statutory mortgage, which also apply to the three jurisdictions in Nigeria, do not transfer any estate to the mortgagee. They operate in the form of creation of an interest and an encumbrance on the property in favour of the mortgagee.<sup>8</sup> The major difference between a charge by deed expressed to be by way of legal mortgage and charge by deed expressed to be by way of statutory mortgage is that in the former, parties have to create the charge by means of a deed while in the case of statutory mortgage, parties have to use the forms in the schedule to create it.<sup>9</sup> However, both of them enjoy the same rights, powers and are subject to the same remedies of a mortgagee whose mortgage was created by sub-demise for a term of years less by one day than the term held by the mortgagor.<sup>10</sup>

One major advantage of both charges is that, apart from being very simple to create, they do not constitute breach of the covenant against assignment in a lease or in the right of occupancy as the case may be. Their creation therefore does not require the consent of the Governor, the local government or the sub-lessor as the

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interest and demise of the right of occupancy or part thereof by the mortgagor.

<sup>1</sup> See Imhanobe, S., (n.22)374; Smith, I., (n. 7) 365-6. These two authors recognized only assignment of right of occupancy and sub-lease(sub-demise) as the only modes of creation of legal mortgage in Conveyancing Act jurisdictions in Nigeria.

<sup>2</sup> Conveyancing Act of 1881 did not provide for this mode of creation. It only provided for charge by deed expressed to be by way of statutory mortgage in S. 26 of the Act. This is created using the statutory form provided in the schedule which may be modified as circumstances provide.

<sup>3</sup> See s. 2(vi) C. A. 1881. S. 87(1) of the Law of Property Act 1925 (U. K.), provided for this mode of creation which was distinct from statutory mortgage provided for in s. 117(1) of the same Act. The 1925 Act was one of the major legislations on property transactions in England after the Conveyancing Act of 1881 & 1882. It does not however apply to Nigeria for the fact that it is post -1900.

<sup>4</sup> See. ss. 109(1) PCL; 15(1) MPL Lagos.

<sup>5</sup> See s. 22(1) Land Use Act. Failure to procure consent may amount to breach of covenant against sub-letting. See *Grand Junction Co. Ltd. V. Bates*(1954) 2 QB 160.

<sup>6</sup> This challenge may be taken care of initially while drafting the mortgage instrument by inserting therein either of the remedial devices of irrevocably declaring the mortgagee as the attorney of the mortgagor, and empowering him, in the event of his default, to sell all his interest in the mortgaged property. Alternatively, mortgagor may appoint himself a trustee of the mortgaged property with the mortgagee as the beneficiary and authorize the mortgagee to replace him with another trustee of his choice in the event of a breach of the mortgage covenants by the mortgagor. See Imhanobe, S. (n.22) 376-7. This problem is however taken care of by statutes in Lagos State and States covered by the Property and Conveyancing Law. In these two jurisdictions, the reversionary interest of the mortgagor is deemed to have merged with the mortgage term once the mortgagee is exercising the power of sale, thus enabling him to sell both his term and the mortgagor's reversion. See ss. 20(1) MPL Lagos & 112(1) PCL.

<sup>7</sup> Each subsequent legal mortgage should however be at least one day longer than the previous term. See ss. 109(2) PCL, 16(2)(b) MPL and under the common law for Conveyancing Act States. See Gravells, N. P. (n.1) 897. The term to be taken by the first mortgagee should be at least ten days less than the term held by the mortgagor so as to enable him to create successive legal mortgages after the first mortgage with the same property. See Megarry, R. et al (n.21) 1178. This perhaps is an exclusive benefit a mortgagor who creates a mortgage by way of sub-demise enjoys. A legal mortgage by way of legal or statutory charge does not permit the mortgagor to create successive legal mortgages. Ss. 17(1)(b) MPL & 110(1)(b) PCL deem any legal charge to be as if a mortgage by sub-demise was created in favour of the mortgagee with a term exactly less by one day than the term held by the mortgagor. A mortgagor who has only one day as his reversion after creating a first mortgage by way of sub-demise cannot create any successive legal mortgage in favour of another mortgagee using the same property. Such mortgagor lacks the requisite number of days to create a subsequent legal mortgage, as each subsequent legal mortgage should be at least one day more than the previous term created for the prior mortgagee.

<sup>8</sup> While a legal charge is simply created by use of any document under seal, the statutory charge is created by using any of the relevant forms found in the schedules to the applicable statutes. See for instance forms 1-4 in 2<sup>nd</sup> Schedule to MPL; forms 1-4 in 4<sup>th</sup> Schedule to PCL & part 1 3<sup>rd</sup> Schedule to CA 1881.

<sup>9</sup> See 2<sup>nd</sup> Schedule to MPL Form 1.

<sup>10</sup> See S. 17 *ibid*

case may be.<sup>1</sup> There are however implied into statutory mortgages, covenants by the mortgagor, to pay the principal and interest at the agreed rate as before and after any judgement, to the mortgagee; and an implied covenant by the mortgagee, at the request of the mortgagor, to discharge the mortgage or transfer the benefits of the mortgage to any person designated by the mortgagor, whenever the mortgagor pays to the mortgagee the principal and the interest in full.<sup>2</sup>

#### 4. Conclusion

Some measure of uniformity surrounding the creation of legal mortgage in different parts of Nigeria currently, despite series of controversies trailing some modes of creation vis-a-vis Land Use Act, is commendable. This feature will have big impact on the development of our laws on mortgage creation and administration in Nigeria. We hope that statutes like Property and Conveyancing Law and Mortgage and Property Law, which contain some provisions which are ostensibly inconsistent with the Act, would be amended by the States affected. This would help in no small way in resolving most of the legal issues involved in the controversies which are highlighted in this paper.

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<sup>1</sup> See Oniekoro, F; (n. 1) P. 70; Gravells, N.P. (n.1) 897. The chargee however in either case, is clothed with the rights, powers and remedies of a legal mortgagee as if his mortgage was created by either assignment of the right of occupancy or by sub-demise as the case may be. See SS. 17(1)(a)&(b) MPL Lagos & 110(1)(b) PCL. In *Grand Junction Co. Ltd v. Bates*(n. 74) Upjohn J. while interpreting s. 87(1) of LPA 1925(UK) which is similar to ss. 17(1) MPL and 110(1)(b) PCL, said: “A mortgage by way of legal charge was a new method of mortgaging property introduced by ss. 85 & 86 of the Law of Property Act 1925. It was introduced .... with a view to simplifying conveyancing and it would be a pity to introduce subtle differences between one way of creating a charge and another way of creating a charge ..... Approaching s. 87(1) in that spirit, I find that the mortgagee is to have the same “protection, powers and remedies” as though he has a sub-demise....” At pp. 168-9.

<sup>2</sup> See ss.49(2) MPL; 137(2) PCL & 26(2) CA. These provisions do not apply to charge by deed expressed to be by way of legal mortgage. Parties have to expressly insert them in the mortgage instrument before they may be applicable.